Informal Comments on Proposed Regulatory Changes to the Rigid Plastic Packaging Container (RPPC) Program

1. Letter Number: 10

Comment: Section 17942 (b) (page 1)
The California Integrated Waste Management Board (CIWMB) needs to provide evidence that 60% of single family homes are served by curbside collection services for each calendar year for these regulations to take effect. A request has been made to the Board for such evidence.

Response: According to the Department of Finance (DOF) website there are 535 reporting jurisdictions in California. The Paris data states 397 have residential curbside collection. This calculates to 74.2 percent in California with residential curbside collection. In addition, the numbers from the last study issued by the Department of Conservation, Division of Recycling for 1999 was 67.8 percent. Because statute does not require the rate be calculated on an annual basis and the rate has been above 60 percent from the effective date of the law, the CIWMB does not feel that it is necessary to calculate the curbside recycling rate on an annual basis.

2. Letter Number: 5, 6, 7, 8, 10

Comment: Section 17943 (a) (page l)
Distribution
The draft regulations propose to expand the current scope of regulated containers by including containers that are both sold and "distributed" into California. In many cases, distribution networks are beyond the control and tracking of product manufacturers. This would include those instances where products are sold to third parties who market and distribute under a private label. The draft regulations do not address the method the CIWMB would use to identify California domestic United States or international distribution networks or how a product manufacturer would be expected to control the flow of commerce through such a third party distribution network. In addition, distribution could be interpreted to include all containers that flow through California ports for distribution throughout the country. Regulating all of these would be nearly impossible for CIWMB staff and could have the unintended consequence of making California's ports less competitive.

The Board has adopted substantial fines for non-conformance with the law and these regulations. Yet, these pages are referred to as "guidelines," Where the Board has chosen to levy fines of up to $100,000, the Board owes the regulated community strict regulations.

Response: The CIWMB agrees and will add the following definition for distribution. "Distributed means any rigid plastic packaging container that is shipped into California for the purposes of being sold or offered for sale in the state of California." The word "distribution" is added to clarify that the requirements of the law are only applicable to rigid plastic packaging containers sold or offered for sale in the state of California, but also containers that are distributed in California. This definition is consistent with Public Resources Code (PRC) Section 42301 (d) and (e) as it defines both a manufacturer and a rigid plastic packaging container. Therefore, the amendment is not expanding the scope of the regulated containers.

The intent of the law is to spur markets for plastic materials collected for recycling and places responsibility for compliance with the law on the product manufacturer that causes the product to be placed in a rigid plastic packaging container that is either sold, distributed, or offered for sale in the State. It is therefore the responsibility of the product manufacturer to ensure that it is taking steps to meet the requirements of the law.
Section 17944 (b) allows product manufacturers to use corporate averaging to achieve compliance. This can be based on national or international sales data or the product manufacturer could label the product not for sale in California.

In addition, PRC Section 42340 (a) exempts rigid plastic packaging containers (RPPC) produced in or out of the states which are destined for shipment to other destinations outside the state and which remain with the products upon that shipment. Therefore, the distribution of containers that flow through ports of California would not be impacted by the law.

PRC Section 42322 states that any violation of this chapter is punishable by a fine of not more than $100,000. The amount is set by statute not regulation, Section 17949 of the regulation clarifies how the Board will determine the amount of the violation, these are regulation and not guidelines.

3. Letter Number: 5, 6, 7, 10, 3

Comment: Section 17943 (b) (2) (page 2)
Multiple Reclosure
The *"capable of multiple reclosure"* definition is proposed for deletion. An immediate impact will be the inclusion of "clam shell" type containers that are not exempted under another provision of the law. Capable of multiple reclosure was drafted at the same time as the "capable of storage for a period of not less than seven days." Does this change bring into the law large reclosable bag (dog food, grass seed, fertilizer, etc.) that can, for a time stand on their own? This change will result in an expansion of the universe of regulated containers at a time when many product and container manufacturers that are currently subject to the RPPC requirements are finding it difficult to obtain a sufficient supply of available post-consumer resin. This disconnect must be addressed before any expansion of the program occurs.

In the FAQ's of the original law, blister packages and plastic clamshell packages were not defined as RPPC. These would be packages that hold items such as batteries and handheld appliances. These types of packages are not specifically identified as being exempt in the proposed law but do not seem to fit the definition that is provided. Could you please comment on whether or not there is any intention to cover these items?

Response: No changes were made to the proposed amendments. As defined in PRC Section 42301 (e) rigid plastic packaging container includes, but is not limited to, bottles, cartons, and other receptacles. It does not state that a container be capable of multiple reclosure or have a lid. The definition, as currently written, is confusing in that similar products are sold in virtually the same type of packaging yet one may have a lid and one may not, therefore one container would be regulated and one would not. For example, in the case of caulking tubes, some are sold with a lid and some are sold without a lid, yet the container itself is identical. However, the only

container regulated would be the one with the lid. It is therefore necessary to eliminate the ambiguity and level the playing field among the regulated containers. The requirements of the law have been in place since 1995 and clearly places responsibility on the product manufacturer. The intent of the law is to create markets and spur the recycling and use of postconsumer plastic, not find ways to decrease the recycling and use of postconsumer plastic. If there is an insufficient supply, product manufacturers should be working with their suppliers and container manufacturers to find ways to expand the markets and use of postconsumer plastic. When packaging determinations are being made product manufacturers should be considering the environmental impacts associated with the type of packaging used as well as conformance with California law.

4. Letter Number: 5, 7, 8, 2, 10, 11

Comment: Section 17943 (b) (11) (page 3)
Definition of 'Manufacturer" or "Product Manufacturer"
The draft regulations propose to revise the definition of "manufacturer" which would result in eliminating the "chain of responsibility" language that is part of the current program. In the first instance, the impact of the changes would be clearer if the term "generator" was defined. However, the overriding question is why any change is needed at all. During the original regulatory development process, CIWMB staff sought a cost effective, unequivocal way to identify responsible parties. At that time, SDA recommended adoption of the standard required by the federal Fair Packaging and Labeling Act (FPLA). This model was subsequently adopted. The FPLA is a universally applied federal law which requires the name of a responsible party on the label. If no such name appears, the package is, first and foremost, in violation of federal law.

The purpose of the changes is unclear. While not cited specifically in the regulations, the deleted sections followed the labeling requirements of the FPLA, Title 15, Chapter 39:

> **§1453. Requirements of Labeling; Placement, Form, and Contents of Statement of Quantity; Supplemental Statement of Quantity.**
>
> - **(a) Contents of label**
>
> No person subject to the prohibition contained in section 1452 of this title shall distribute or cause to be distributed in commerce any packaged consumer commodity unless in conformity with regulations which shall be established by the promulgating authority pursuant to section 1455 of this title which shall provide that -
>
> - (1) The commodity shall bear a label specifying the identity of the commodity **and the name and place of business of the manufacturer, packer, or distributor;** (emphasis added)

Following the FPLA assures that a responsible party can readily and simply be identified for every product. It does this without getting into the tangle of brand names, licenses etc. which can be inaccurate designators of responsibility. For example, the formulator of Brand X may

produce all its products in-house, or, have the product “packed” by a third party, or, use any combination of the two. In this instance, the single constant is the brand name.

The original language was unequivocal in the assignment of responsibility and focused on the party responsible for producing a product or stipulating product specifications, including packaging. The rewritten definition apparently exempts brand owners if they outsource manufacturing, instead obligating their contract manufacturers. In some cases, brand owners could outsource the packaging manufacturing, product manufacturing, and packing/filling functions to 3 separate companies. The product manufacturer under the draft definition could be supplying the product to a third-party packer-filler and would have no knowledge of, or contact with, the regulated container. The product manufacturer would also not have a contractual relationship with the container manufacturer or the party responsible for the packaging specification. In this case, it does not seem logical to require compliance of the product manufacturer.

This change makes a product manufacturer responsible for documenting compliance even if their name does not appear on the package, which would seem to make enforcement more difficult, as the Board must notify these product manufacturers according to Section 17945.2. If definition is not modified, then provisions should be added to Section 17945.2 to address the appropriate response to a certification request received by a brand owner, distributor, or packer/filler who is not the product manufacturer but is presumed by the Board to be the product manufacturer on the basis of the name(s) on the product package.

The definition should be expanded to clarify responsibility for private label products. In the case of private labels, the manufacturer is not the brand holder. As a result, it is unclear if the manufacturer would be considered to have "responsibility" for these private label products, or if the responsibility would lie with the retailer/brand holder that orders and sells the product.

The definition should clarify whether the condition "that is stored inside of a rigid plastic packaging container applies to the product at the time it is supplied by the product manufacturer or at the time of sale to the final end user. The former interpretation would effectively limit the definition of "product manufacturer" to manufacturers that also pack and/or fill, whereas the latter would encompass any company manufacturing products that are later packed in rigid plastic containers.

Defining “manufacturer” to include all “…divisions, subsidiaries and any other entity, or brand name, for which the manufacturer has responsibility, regardless of whether the manufacturer’s name is on the label…,” simply complicates the CIWMB staff’s job of determining responsibility. Clarity is also needed as to what the term, “… any other entity…” means. Another question is whether or not there have been specific instances where the original definition failed to be effective. It has been recommended that the definition be revised to delete the word “manufacturer” in the title and retain “product manufacturer” to be consistent with definition #3, relating to definition of “container manufacturer.”

It is also unclear how these proposed changes would affect Section 17944 (b) which allows manufacturers to base their averaging on the “…entire product line or any sub-lines determined

by the manufacturer." This provision is essential for providing manufacturer flexibility and ought not to be compromised.

Further, the proposed definition adds new language to expand "sold or offered for sale in California" to include "direct sale, "sale through a distributor," franchises," and on the "Internet." The ability for a manufacturer to trace sales of distributors is highly questionable, as is the authority of the CIWMB to regulate Internet sales. This runs into "non-compete" agreements and the protection of proprietary information. No product manufacturer has the right to know where or how much of any product another company in its distribution channel sells. Making this requirement a regulation could open up huge legal issues with "non-compete" agreements and create serious market disadvantages for distributors down line from the manufacturer. This change also raises federal Commerce Clause questions.

Finally, the ability to regulate products packaged in RPPC's that were manufactured outside of the United States is not addressed with these proposed changes. There remain significant tracking and enforcement barriers that result in some companies being subject to fines/penalties, while others are not this is a clear equity issue.

Response: The proposed amendment to the regulations is changed as follows:
"Manufacturer" or "Product Manufacturer" means the producer or generator of a product that is sold or offered for sale in the state and that is stored inside of a rigid plastic packaging container. Manufacturer, as stated on the label, includes all division subsidiaries, and any other entity, or trade/brand name for which the manufacturer has responsibility. The proposed change does not eliminate the chain of responsibility but clarifies in a simplified term the chain of responsibility as stated on the label.

Should a product manufacturer sell a product in a regulated container through the internet or any other means, then that container is being sold, offered for sale, or distributed in California and is subject to the requirements of the law. The law clearly puts the responsibility on the product manufacture for any product sold or distributed in California in a regulated container.

5. Letter Number: 10

Comment: Section 17943 (b) (11) (A) (page 4)
We find this section confusing and do not fully understand what the Board intends. Does this mean that a Product Manufacturer must be able to report to the Board where every RPPC it produced (in any given certification period) was delivered? Does it only include those RPPCS shipped that were "non-compliant?" In other words, if all RPPCs exempted by DOT, EPA, FDA and all complaint containers are not counted then the only RPPCs that anyone would report would be RPPCs that do not meet a compliance option. It is not clear what the Board wants to have included when tallying sales into California or the purpose served by this requirement.

Response: No changes were made to the proposed amendments. The definition clarifies that sold or offered for sale includes all sales into California, including direct sales, and sales through distributors, franchises and the Internet. If a product manufacturer is selling product in a regulated container through the internet or any other means, then that container is being sold,

offered for sale, or distributed in California and is subject to the requirements of the law. The law clearly puts the responsibility on the product manufacturer for any product sold or distributed in California in a regulated container. If the RPPC is holding a product that is specifically exempted by statute, then that container would not be a regulated container.

6. Letter Number: 5, 6, 7, 10

Comment: Section 17943 (b) (28) (page 7)
Replacement Products
The draft regulations would restrict the reuse of packaging containers by a large group of potential replacement product manufacturers by limiting the replacement to only the original manufacturer. The regulations should not have the unintended impact of limiting reuse and refilling (replenishing) of RPPCs.

Response: No changes were made to the proposed amendments. The statement is beyond the scope of the regulatory effort and any change would have to be done by statute. The amendment clarifies the definition for consistency with statute for both a refillable and reusable package in that the container is routinely refilled or reused with the original product (PRC 42301 (b) and (c). PRC 42301 (b) states in part "is routinely returned to and refilled by the product manufacturer at least five times with original product held by the package", and PRC 42301 (c) states in part "is routinely reused by consumers at least five times to store the original product contained by the package." Therefore the Board is limited by statue to the definition. In addition, there is no mechanism that could determine that the container is actually being reused or refilled at least five times by the consumer with other products other than the original product. Such a requirement would be over burdensome for any product manufacturer to track.

7. Letter Number: 5, 6, 7, 4, 8, 2, 9, 1, 10, 11

Comment: Section 17943 (b) (29) (page 7-8)
Revision of the Definition of RPPC
We would suggest the following wording for the list of permissible non-plastic parts in 1): "caps, lids, labels, handles, hinges, or other incidental components made of non-plastic material or a composite of plastic and non-plastic material."

The draft regulations propose to revise the definition of "rigid plastic packaging container" to include containers that utilize "non-plastic" material (e.g. plastic buckets with metal handles). Rigid plastic packaging containers have traditionally be defined as "made entirely of plastic" except for lids, caps and labels. Under such definition, plastic containers with metal handles have not been regulated as RPPCs. The potential impact on industry is that the supply of PCR may come up short, as more containers are required to have 25% PCR thereby, causing supply and pricing issues based on demand. The thought process that more PCR will be available because more containers will be recycled is faulty. Just because 5.0 gallon pails with metal handles would now be required to be made with 25% PCR does not mean more 5.0 gallon pails will be recycled. If they are not recycled, then the national supply of PCR could be diminished; as more manufacturers order pails with 25% PCR. Further, the product sold to industrial users may contaminate the container. For example, epoxy-based materials that may not be deemed

hazardous by DOT but which, as residual material, are likely to be contaminants to the recycling stream. These products will be discarded.

The regulations also propose to eliminate the ability to use either the labeled or actual volume of a container in determining whether the product is subject to the RPPC program. There is no statutory authority. This regulation change cannot be undertaken absent statutory amendments. The statutory definition of "rigid plastic packaging container" is based solely on the physical capacity of the container, not the labeled volume of its contents:

> "Rigid plastic packaging container" means any plastic package having a relatively inflexible finite shape or form, with a minimum capacity of eight fluid ounces or its equivalent volume and a maximum capacity of five fluid gallons or its equivalent volume…"

The definition of container size should be expanded to provide additional detail on assessing fluid volumetric capacity. CIWMB should clarify 1) how to calculate volumetric capacity and 2) applicability of regulations to containers not capable of holding liquid in practice (for example, containers with windows or clamshells that do not seal tightly).

Since the RPPC Law was adopted in the early 1990's, companies selling products into California have relied on volumetric capacity as the trigger, and have made packaging decisions as a result of such reliance and cannot now be asked to completely shift gears and change their entire packaging strategy. The proposed amendment will place additional economic pressure on small businesses, potentially forcing them to make substantial and expensive changes to their packaging. Significant technological issues exist for many of these containers that could compromise the integrity of packaging. Prior to expanding the universe of regulated containers, the CIWMB should conduct a more thorough investigation as to the containers that would become subject to the RPPC requirements and whether there are any barriers (e.g. packaging integrity compromised by using post-consumer content, available post-consumer content, etc.) to meeting these requirements.

Response: The CIWMB will change the proposed amendments to include the language that was included in the initial regulations on how to calculate the volumetric capacity. If a RPPC holds a product that is not liquid or the container has a hole or opening in it, the container is still regulated, the size of the container would be determined by its equivalent volume. No other changes are made to the definition. Adding the words handle or hinge made of non-plastic material is consistent with the exclusion of caps, lids, and labels. The definition that the RPPC is made entirely of plastic is specific to the container and not any caps, lids, handles, or labels. The intent of the law is clearly to include containers that have a capacity of eight fluid ounces or its equivalent volume and a maximum capacity of five fluid gallons or its equivalent volume. Should the label state anything under eight (8) ounces or over five (5) gallons then the container would not be subject to the requirements of the law.

8. Letter Number: 11

Comment: Section 17943(b)(29)(E)
Durable products / Storage cases

It would be helpful to include a definition, threshold, or criterion for determining whether a product is durable for example, "a product that is designed to have an expected useful life of at least x years." At a minimum, "durable product" could be defined as any product that is designed for repeated use and is not consumable, i.e. is not depleted by each use. The definition should clarify whether items such as media cases (e.g. for CDs, DVDs) are covered or exempted.

Response: Prerecorded CDs and DVDs, packaged in individual jewel cases, that are within the eight ounces up to and including five gallons would not be regulated. This does not include blank CD-RW or DVDRs that are packaged in spindle cases.

9. Letter Number: 5, 7, 10

Comment: Section 17943 (b) (30) (pages 8 and 9)
This section retains obsolete dates that in some cases may not account for technological advances that occur in the plastic packaging industry. This may be especially true for newly introduced packaging that utilizes the least amount of material at the outset. The RPPC program should recognize and credit advances in packaging efficiency.

Also, in subsection (C) (3) the language in the current regulations states, “Packaging changes that adversely affect the potential for RPPCs to be recycled.” This is very loose language that can be misused by the CIWMB. The language should be changed to place the responsibility on the Board to demonstrate that a packaging change does, in fact, adversely impact recycling by providing the evidence themselves. There should be no presumption that packaging changes negatively impact the “potential” for recycling.

Response: No changes were made to the proposed amendments. This request is beyond the scope of the regulatory effort. The requirements for source reduction are specified in statute and would require a statutory change. The CIWMB in the Violations and Penalties Section 17949 allows credit for progress towards meeting one or more of the compliance options as well as other factors such as technological feasibility of compliance. The definition of a source reduced container is consistent with PRC 42301 (i) and any changes would have been done by statute. Subsection (C) (3) again is specific to statute. The responsibility of meeting the requirements of the law lies with the product manufacturer, not the CIWMB, therefore the burden of proof is with the product manufacturer.

10. Letter Number: 10

Comment: Section 17944(a) (5)
Section 17944(a) (5) appears to conflict with the addition of “distribution” in 17943(a).

Response: No changes were made to the proposed amendments. Section 17944 (a) (5) is a compliance option and is applicable only to containers which contain floral preservatives and reused by the floral industry for at least two years. Any such change would have to be done by statute.

11. Letter Number: 10

Comment: Section 17944 (b) (page 12)
We find this section to be confusing. Our understanding of this revision is that a product producer can use source reduction for one container and PCR content for others. Is this true?

Response: No changes were made to the proposed amendments. The change simply clarifies that every rigid plastic packaging container does not have to individually meet one of the compliance options as opposed to compliance standards. Corporate averaging allows the product manufacturer to use any one of the compliance options which can be used for the entire line or any sub-lines. If a company has more than one line it does not have to meet compliance though corporate average of all lines just for postconsumer. The company has the option to use corporate averaging by using postconsumer resin for one or more lines and could use corporate averaging through source reduction for other lines. Corporate averaging can be specific to California or nationwide.

12. Letter Number: 5, 6, 7, 8, 10

Comment: Section 17945 (a) (1) (page 12)
The proposed regulations specify that product manufacturers are responsible for compliance with the RPPC program at all times "regardless of whether or not the product manufacturers are notified to submit a certification package." Without a major effort to educate industry, imposition of this responsibility would be unfair. The CIWMB should undertake an outreach effort to help inform the regulated community on the requirements of the RPPC program.

Response: No changes were made to the proposed amendments. The statement has been a requirement of statute since 1995. Although the comment that the CIWMB should undertake an outreach effort is beyond the scope of the regulatory effort, the CIWMB has in the past, taken numerous outreach efforts, and will continue to do so in the future.

13. Letter Number: 5, 7, 8, 2, 10

Comment: Section 17945.2 (a) (1) (page 13)
Submitting Certifications
The proposed regulations would now require product manufacturers to report "all sales into California, including but not limited to direct sales, distributor sales, and Internet sales." The issue of the ability of a product manufacturer to track and report distributor sales and Internet sales perhaps made via a third party is raised. In addition, products may be picked up by or delivered to regional distribution centers for supermarket chains and mass retailers where they are subsequently transshipped to retail outlets or other distribution centers in a multi-state environment. Modern product distribution is a highly attenuated system. For example, an Internet seller based in Connecticut might have a central warehouse in Illinois for shipping efficiencies and delivering product to South Carolina. How is the product manufacturer supposed to know the geographical end point of his products when he is three degrees separated from the final consumer? The issue of proprietary information is also not addressed in this section.

While this requirement may be germane to manufacturers using the California-only compliance mechanism, we do not understand its relevance to those using general corporate averaging. Moreover, when compliance is undertaken based on general corporate averaging, California sales statistics are irrelevant to compliance. The statutory basis for this proposal is questioned.

Response: No changes were made to the proposed amendments. The change is consistent with and clarifies Public Resources Code (PRC) Section 42301 (e) as it defines a rigid plastic packaging container as any plastic packaging … for sale or distribution in the state. It is also consistent with PRC Section 42301 (d) in the definition of a manufacturer as the producer or generator of a product that is sold or offered for sale in the state and stored inside of a rigid plastic packaging container. Therefore, the amendment is not expanding the scope of the regulated containers. If a product manufacturer is selling product in a regulated container through the internet or any other means, then that container is being sold or distributed in California and is subject to the requirements of the law. The law clearly puts the responsibility on the product manufacture for any product sold or distributed in California in a regulated container. If a product manufacturer chooses to meet compliance by use of the corporate average it is not necessary to break out California only sales.

14. Letter Number: 10

Comment: Section 17945.2 (a) (2) (page 13)
This section needs to be amended to state that upon submittal of a container manufacturer certification to a product manufacturer, under penalty of perjury, that the submittal of that certification for compliance shall hold the product manufacturer harmless for any misrepresentation or false information provided on the certification. Also, the last sentence relating to information to be submitted, "As with the Board (sic) supplied container manufacturer certification," is an awkward sentence that is not clear in its meaning. Clarification is requested.

Response: No changes were made to the proposed amendments. The statement is beyond the regulatory effort and any change would have to be done by statute. Statute clearly puts the requirement of the law with the product manufacturer not the container manufacturer. The CIWMB does allow when assessing fines and penalties other factors that may be considered such as, documented efforts to obtain compliant containers. If the product manufacturer can provide clear documentation that is has taken all feasible steps to obtain compliant containers that will be considered.

15. Letter Number: 5, 6, 7, 8, 10

Comment: Section 17945.2 (h) (page 15)
<u>Record Keeping</u>
The draft regulations propose to establish a four-year records retention requirement. Industry standards for retention of these types of sales and procurement records are three (3) years and therefore would suggest that the three-year policy apply.

"Records" must be more clearly defined. The Board has taken away the requirement for container manufacturers to be able to produce purchasing and production records during the

audit of a product manufacturer as seen in the current regulation under 17946.5 Documentation Requirements (a) (1) (A).
What records would a manufacturer have to retain in order to prove compliance? The manufacturer may have Purchaser Orders to the Container Manufacturer or Certificates of Compliance from the Container Manufacturer for every shipment received both of which could state that the containers were made with PCR. However, there is no indication from the Board that this would be acceptable proof of compliance.

See Section 17947 (d) Auditing for further discussion on this topic.

Response: The CIWMB agrees subsection 17945.2 (h) is amended to state three (3) years for consistency with industry standards.

16. Letter Number: 10

Comment: Section 17945.3 (b) (pages 17 and 18)
We oppose this section! In the section entitled: "Note" there should be language inserted that the container manufacturer certification of compliance shall constitute compliance for that container by the product manufacturer who accepted the container manufacturer certification under penalty of perjury.

Response: No changes were made to the proposed amendments. The statement is beyond the regulatory effort and would have to be done by statute. The law clearly places responsibility on the product manufacturer not the container manufacturer.

17. Letter Number: 5, 7, 8, 10, 11, 12

Comment: Section 17945.3 (c) (1) (D) (page 18)
This section appears to expand the scope of regulated containers by defining sales as "sold, distributed, provided free as a sales promotion, etc." This is inconsistent with the law requiring compliance for containers "sold or offered for sale" in California. Further, the existing rules do not include samples and promotional materials. As noted earlier, this regulatory package would expand the scope of regulated containers when many product manufacturers are currently struggling to find available post-consumer content to comply with the RPPC program. This inclusion of this language is burdensome and unworkable.

<u>Seasonal or Promotional Products</u>
The first time a product is offered for sale in California, it is considered introduced. When a seasonal or promotional product is placed for the first time on the market and is only in the stores for a short time, less than a year, requirements are waived for a period of 12 months. If this same product is placed on the market again the following year and is only in the stores for a short time, less than a year is it then subject to RPPC (because it is no longer be considered introduced)? If the same packaging system with a variant of the product is placed on the market again the following year and is only in the stores for a short time, less than a year, is it then subject to RPPC?

An example would be a disposable razor, where a travel bag or brush is offered as a special sales or holiday-related promotion. The life of the package is less than six months and the promotion usually are not repeated. The regulations provide that "[All] requirements of Section 17944 of this Article are waived for an introduced product or package, pursuant to Section 17943(9), for 12 months immediately after the date on which it is first sold or offered for sale in California." While this would appear to exempt promotional packaging, it is requested that additional language be included to define an "introduced" package as including promotional packaging, where the shelf life of the packaged product is less than six months, and where the mix of packaged products differs from that sold in prior promotions.

Response: The CIWMB has defined distributed to mean any rigid plastic packaging container that is shipped into California for the purposes of being sold or offered for sale, therefore samples or free promotional items would not be regulated because the item is not being sold or offered for sale.

18. Letter Number: 10

Comment: Section 17945.4 (a) (6) (page 25)
New language should be added to subsection (6) to clarify the responsibility of the container manufacturer to bear responsibility to render the product manufacturer harmless of violation of the law by completion of a certification for compliance for any container.

Response: No changes were made to the proposed amendments. The statement is beyond the scope of the regulatory effort and any change would have to be done by statute. The law clearly puts responsibility for compliance with the product manufacturer.

19. Letter Number: 11

Comment: Section 17946(b) (l)
There appears to be an error in numbering in Section 17946, Waivers. The third paragraph under 17946 (b)(l) discusses requirements for waivers under Section 17946 (a)(4). There does not appear to be a Section (a) (4); the requirements seem to apply to Section 17946 (a)(3).

Response: The CIWMB agrees and subsection 17946 (a)(4) is corrected to read 17946 (a)(3).

20. Letter Number: 11

Comment: Section 17946(b) (3)
The waiver requirements discussed under 17946 (b)(3) reference Section 17946 (a)(3), but seem instead to apply to Section 17946 (a)(2) or to the old 17946 (a)(3), which has been deleted. If so, this section should be deleted.

Response: The CIWMB agrees and subsection 17946 (b)(3) is deleted since it only applied to the first year of certification and is no longer applicable.

21. Letter Number: 10

Comment: Section 17947 (d) Auditing (page 39)
The question asked, "What if I cannot support my claim of compliance" is the most important to be asked in the entire regulation. Clearly, as the draft is now written, no manufacturer could prove compliance because there is no clear definition of what records are required to prove compliance. This must be clarified by the Board.

Under current auditing rules, the Boards' agent may request purchasing and production records from a container manufacturer to support compliance claims made by a product manufacturer. This draft has eliminated that requirement of container manufacturers leaving product manufacturers with no clear definition of how to prove compliance. It is critical that this part of the regulation be addressed and clearly defined.

Response: No changes were made to the proposed regulations. Section 17945.2 and 17945.3 sets out all information that is necessary for a product manufacturer to include in its certification. As such under an audit the CIWMB would be looking to make sure that the product manufacturer followed and provided the documentation outlined in Section 17945.2 and 17945.3 as it pertains to the specific compliance option(s) that the product manufacturer claimed.

22. Letter Number: 10

Comment: Section 17949 (f) (page 50)
The Board has, in at one least case, found a company out of compliance but, when considering a level of fines, determined that the amount of plastic in question was "deminimus." The Board and these amendments need to define deminimus! A new section is needed under the provisions that allow for an Administrative Law Judge to consider a "diminimus" volume as mitigation to assessment of any fine. Further, the ability to make a "diminimus" finding should be incorporated into the CIWMB evaluation of each regulated entity that may be considered for non-compliance with the RPPC law.

Response: No changes were made to the proposed amendments. Section 17945.2 (b) allows the CIWMB to consider the company size and impact on California's waste stream as well as other factors when requesting a certification from a product manufacturer. Section 17949 (f) gives the Administrative Law Judge the same authority when determining fines and penalties, such as impact on diversion and sustainable markets and company size. In addition, as part of the protocol adopted by the CIWMB at its December 2004 meeting, staff will proactively look at companies that have a significant impact on the California waste stream when requesting certifications.

23. Letter Number: 5, 6, 7, 10, 11

Comment: Proposed New Section
<u>Grace Period and Outreach</u>
Add a new section under Section 17946(a) to provide at least a one year waiver for previously unregulated products after these regulations are finalized. The revised rule should include a deadline by which previously exempt products (e.g., heat-sealed blisters) currently being sold in

California must comply with the regulations. This is necessary to give manufacturers and/or their suppliers adequate time to identify and certify new resin sources and exhaust existing stocks of packaging materials and would allow CIWMB staff to conduct a comprehensive outreach and educational effort aimed at the regulated community on the requirements of the RPPC program. We recommend a joint effort to educate the plastic container industry of the requirements of the RPPC program.

Response: No changes were made to the proposed amendments. As indicated in the proposed timeline the CIWMB indents to have the proposed amendments approved by July 1, 2006 with an effective date of January 1, 2007 with notification of compliance requirements mailed in 2008. The CIWMB has provided and participated in numerous outreach efforts from inception of the law and will continue to work with the industry and provide outreach efforts in the future. The October 12, 2005 conference will provide additional opportunity for the regulated community to provide comments on the proposed amendments and will also participate in future interactive and outreach efforts.

24. Letter Number: 5, 6, 7, 4, 8, 1, 11, 12

Comment: General Comments

a. Unavailability of Post Consumer Resin

These proposed regulations represent significant, new requirements to existing and new products and packaging. One of the largest concerns of our industry is the unavailability of post-consumer recycled resin (PCR) for current products under regulation. Container manufacturers have stressed that they remain uneasy about supplying rigid plastic packaging containers made from at least 25% recycled material. Citing an increase in stress cracks and resultant spills, container manufacturers have noted that compliance is likely to have extremely unfortunate consequences 25% post consumer resin will destroy the integrity of some containers.

Product manufacturers report that they continue to have great difficulty purchasing RPPCs made out of at least 25% PCR and that the injection grade of post consumer high density polyethylene is limited. A majority of the material is blow mold grade. In processing post consumer resin it is impossible to analyze the physical characteristics because every pound is different due to the multiple sources that feed into it. An unknown foreign material can change the molecular structure of the plastic material. A specific resin is ordered from the plastic industry that reacts correctly when it goes through rapid heating and rapid cooling during the compression injection process. Stress cracking is a large potential problem. Adding 25% of an unknown and inconsistent material destroys the plastic manufacturers' ability to maintain control systems. Consistency of raw material is vital to prevent stress cracking, which may occur as the container ages. Since the possibility of stress cracking increases with the aging of the container, there is no way to determine a potential problem when the container is manufactured. The failure will normally be a fracture from top to bottom of the side wall or a fracture completely across the bottom of the container, the total contents of the container will be lost.

Product manufacturers also state that they continue pay higher amounts for RPPCs made out of at least 25%. A number of companies claim that they cannot pay the higher packaging price and continue to complete in an industry where margins are low and sales are limited. The loss of competitive pricing from vendors can ultimately result in companies having to stop selling in the state of California.

Comments suggest that the CIWMB utilize its planned October RPPC workshop as a forum to discuss this issue thoroughly, examine ways in which to recognize and reward container manufacturers and product companies who divert from disposal other plastics and look for ways in which to expand compliance options in those instances where PCR is not available.

Suppliers tell us that global competition continues to deplete the supply of post-consumer resin available to U.S. manufacturers; a reliable supply cannot be guaranteed. Even if box grade plastics became reliably available with post-consumer recycled content, the grades would lack the performance properties needed to manufacture this company's products to the requirements of its customers.

Response: No changes were made to the proposed amendments. The statement is beyond the regulatory effort. The intent of the law as initially written and effective January 1995 is to spur markets for plastic materials collected by requiring manufacturers to utilize increasing amounts of postconsumer plastic in their rigid plastic packaging containers. If there is an insufficient supply then product manufacturers should be working with suppliers and container manufacturers that will supply postconsumer material. If there is an insufficient supply of postconsumer material product manufacturers should be working with their suppliers and container manufacturers to find ways to expand the markets and use of postconsumer plastic. When packaging determinations are being made product manufacturers should be considering the environmental impacts associated with the type of packaging used as well as conformance with California law. The CIWMB staff will be seeking to engage product manufacturers, local suppliers, local government, and other stake holders in collaborative efforts to increase plastic recycling.

b. Source Reduction

The CIWMB is asked to recognize the significant efforts on the part of the RPPC manufactures in the area of source-reduction in containers, specifically advances in packaging design and efficiency that have been demanded by market forces up to this point. Containers manufactured or introduced into the marketplace today are likely to be much more efficient than in the past and it is our concern that requirements to utilize PCR may actually reduce these efficiencies in order to prevent packaging from being compromised. It is unclear how the current RPPC program recognizes these advancements. We would ask that these issues be addressed prior to any of these proposed changes becoming effective. Reducing the package again, a year after it has been introduced to the market is not feasible. However, the remaining options are equally unfeasible. The revised regulations do not recognize advances in packaging efficiency; realistic options for new packaging, after its first year of introduction, are needed in these regulations.

Response: No changes were made to the proposed regulations. This request is beyond the scope of the regulatory effort. The requirements for source reduction are specified in statute and would require a statutory change. The Violations and Penalties Section 17949 allows credit for progress towards meeting one or more of the compliance options as well as other factors such as technological feasibility of compliance. The definition of a source reduced container is consistent with PRC 42301 (i) and any changes would have to be done by statute.

c. Bio-based Plastics

Chapter 561, Laws of California, prevents source reduction compliance if (a) a different material type is substituted for material that previously constituted the principal material of the container; (b) increasing a container's weight per unit or use of product after 1/1/91; or (c) packaging changes that adversely affect the potential for the RPPC to be recycled or to be made of postconsumer material. These limitations appear to ban the use of bio-based plastics for non-food, drug or cosmetics applications. It is unclear whether the term "material type" refers to substrate or resin; and no methodology exists for manufacturers to determine whether "the potential" for an RPPC to be recycled has been impacted by the use of bio-based plastics. Technically, it can be recycled. However, as of today, a market for recycling bio-based RPPCs has yet to be developed. The proposed regulations need to address how rapidly-developing new technologies can be incorporated into the RPPC program.

Response: No changes were made to the proposed amendments. The statement is beyond the regulatory effort and any changes would have to be done by statute. Clearly further research is necessary on the use of bio-based plastics. Before bio-based plastic could be considered for source reduction its impact on the ability to be recycled as well as whether or not it may be a contaminant to current plastic recycling infrastructure must be determined.

d. Overseas Manufacturers

The ability to regulate products packaged in RPPCs that were manufactured outside of the United States is not addressed with these proposed changes. There remain significant tracking and enforcement barriers that result in some companies being subject to fines/penalties, while others are not. This could create significant economic barriers to US companies.

Response: No changes were made to the proposed amendments. The law clearly places responsibility on the product manufacturer as the producer or generator of a product that is packaged in a rigid plastic packaging container and sold, offered for sale or distributed in California. Therefore if a product manufacturer wants to sell product into California then that product manufacturer needs to make sure that it is in compliance with all of California's product or packaging laws.

e. Alcoholic Beverages

The regulations are unclear as they relate to liquor packaging. Are alcoholic beverages considered "food" by definition within the scope of the Food, Drug and Cosmetic Act Title 21- Food and Drugs, Chapter 9 – Federal Food, Drug, and Cosmetic Act, Subchapter II Definitions, Sec. 321, and therefore exempt from the RPPC regulations? This would impact,

for example, plastic beer bottles. Alcoholic beverages are governed by the Bureau of Alcohol, Tobacco and Firearms – not the Food and Drug Administration. While it seems logical that packaging for alcoholic beverages would be given the same exemption as that for food, drug and cosmetics, clarification is needed in the revised regulations to address this omission.

Response: According to the Food, Drug and Cosmetic Administration "Beer, wines, liquors and other alcoholic beverages are specifically subject to the Federal Alcohol Administration Act, enforced by the Bureau of Alcohol, tobacco and Firearms of the U.S. Treasury Department. Staff is currently working with the two federal agencies to determine the regulatory relationship between the two.

f. Secondary Packaging

(Sales packaging not in direct contact with the product)

1. Multiple layers of packaging around a single product: Would a plastic box that holds a paperboard folding carton be subject to the RPPC regulations?

   Response: If the product being sold is a paperboard folding carton and it is packaged for sale or distribution in the plastic box and the plastic box is within the eight ounces up to and including five gallons, then the plastic box would be considered a regulated container. Accordingly, if the paperboard folding carton is holding a product that is not a product exempted by statute (food, drug, cosmetic, etc.) then the plastic box would be a regulated container.

2. Extension of exemptions to secondary packages: Assuming secondary packages as in point a. are covered, if a primary package is an RPPC that is exempt, are RPPCs used as outer sales packaging also exempt? (For example, a plastic box around a jar or bottle containing food, drugs, cosmetics, etc.)

   Response: If the product being sold is a food, drug, or cosmetic, or other exempted product, and it is packaged in a rigid plastic packaging container it would not be consider an RPPC because of the exemption, if the container holds a product that is not exempted by statute, then the container would be a regulated container.

3. Multiple products in one sales unit - Do exemptions in Section 17946.5 apply to all containers in a sales unit, where the sales unit contains an exempt container or exempt product?
   For example, a plastic blister holding a razor and blades also contains a container of shaving lotion (an exempt RPPC). Is the entire product's packaging (i.e. blister) exempt because the sales unit contains a separately packaged cosmetic product?
   If so, is the exemption on the basis of the exempted product or the exempted RPPC? (I.e. in the scenario above, would the blister be exempted if the set contained a plastic container of shaving lotion?)
   Does the applicability/exemption depend on whether the "main product" is covered or exempt? For example, consider the blister package when used for the following products:
   a. A set containing a razor and shaving cream

b. A set containing shaving cream and after-shave lotion
c. A razor packaged with a free sample of shaving cream

Response: While the statement is beyond the regulatory effort and is specific to individual packaging, if the blister packaging is the type of packaging that has a paperboard backing and is not a container made of all plastic it would not be considered a regulated container. Specific packaging determination will be made on a case by case basis, staff will review the comment and provide a determination at a later date.

g. Packages with Additional Functions

The regulations should clarify whether a packaging item is an obligated RPPC when it is marketed as having another function after it has served its packaging function (such packages would not be considered reusable under the regulations, but could be claimed as being a product). We recommend adding a definition of "packaging" to Section l7943 (b) to distinguish between packaging and product. (Note that this issue has been addressed by packaging laws in other jurisdictions.)

Response: No changes were made to the proposed amendments. The statement is beyond the regulatory effort and any type of change would have to be done by statute. The RPPC law is very specific in that it pertains to products packaged in regulated containers not how the package is used after it has served its packaging function.

h. Recycling Rate

The required 45% recycling rate for product-associated or particular type packaging is unrealistic. Combined, member states of the European Union, who have invested a tremendous amount of money into their recycling infrastructure, have reached an overall plastics recycling rate of only 25.4 percent. Germany alone has reached a 45 percent recovery rate for plastics packaging. [ASSURRE report on Packaging and Packaging Waste Statistics for 2002]

Response: No changes were made to the proposed amendments. The statement is beyond the regulatory effort and any type of change would have to be done by statute.

i. Tear-apart packaging

This is a plastic packaging container that consists of a sleeve surrounding and protecting a rigid plastic tray (which holds a product). The sleeve is capped and sealed at both ends. The customer is required to tear open the sleeve along a "zip" line in order to access the product. Prior to filling, the sleeve is flat and requires the insert to maintain its shape. Once opened, the sleeve is destroyed; it falls open and does not have "essentially the same shape empty as full." The tear-apart aspect of this package, combined with the flexible nature of the sleeve makes it a flexible package, not a rigid package. The definition of "rigid container", however, is vague as it does not state at what point the package must have "essentially the same shape empty as full." A mock-up of the package will have the same shape empty as full; however, in reality, the package only retains its shape when holding a product.

Response: No changes were made to the proposed amendments. The statement is beyond the regulatory effort and requires an interpretation of the container and if it is a regulated container or not. Staff will review the comment and provide a determination at a later date.

Letter Number	Commenter
(5)	**American Chemistry Council (ACC)** 1121 L Street, Suite 910, Sacramento, CA. 95814
(6)	**Rigid Plastic Packaging Institute (RPPI)** 179 S. Kenilworth, Elmhurst, IL 60126
(7)	**Grocery Manufacturers Association (GMA)** 1215 K Street, Suite 1450, Sacramento, CA. 95814
(4)	**International Sanitary Supply Association, Inc. (ISSA)** 7373 N. Lincoln Avenue, Lincolnwood, IL. 60712-1799
(8)	**National Paint and Coatings Association (NPCA)** 1500 Rhode Island Avenue, NW, Washington, D.C. 20005
(2)	**The Soap and Detergent Association (SDA)** 1500 K Street, N.W., Suite 300, Washington, D.C. 20005
(9)	**Livingston & Mattesich (Plastic Shipping Container Institute)** 1201 K Street, Suite 1100, Sacramento, CA. 95814-3938
(1)	**Norton Packaging** 20670 Corsair Boulevard, Hayward, CA. 94545

(10) **Illinois Tool Works, Inc. (ITW)**
Corporate Headquarters, 3600 West Lake Avenue, Glenview, IL. 60026-1215

(11) **Environmental Packaging International (EPI)**
41 Narragansett Avenue, Jamestown, RI. 02835

(12) **MeadWestvaco's AGI Klearfold Division**
299 Park Avenue, New York, NY. 10171

(3) **Spectrum Brands**